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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT CORPORATION, *et al.*,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is an absent member of a class certified under Rule 23, Federal Rules of Civil Procedure, a "party" within the meaning of 28 U.S.C. § 455(b)(4) such that the Justices of the Supreme Court, district and circuit judges, and members of the Judicial Panel on Multidistrict Litigation must recuse themselves if they or their spouses own stock in any absent class member?

PARTIES TO THE PROCEEDING

Petitioners are named plaintiffs in *In re Cement and Concrete Antitrust Litigation,* MDL Docket No. 296, a multidistrict class action currently pending in respondent United States District Court for the District of Arizona, and are listed in note 2, *infra.* Real parties in interest, defendants below, are listed in note 3, *infra.*

Petitioners recognize that compliance with Supreme Court Rules 21 and 28 ordinarily is accomplished in class actions by listing only the named representative parties. *E.g., Weyerhaeuser Co.* v. *Lyman Lamb Co.,* No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.,* No. 81-1619, ____ U.S. ____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). However, the Ninth Circuit's opinion in this case (Appendix A hereto) affirmed a district court order (*In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076, 1079-80 (D. Ariz. 1981)) holding that all 210,235 putative members of the classes herein are "parties" for purposes of recusal under 28 U.S.C. § 455(b)(4), thus compelling the identification of all class members as "parties." Accordingly, petitioners are filing concurrently herewith a "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" to obtain (A) leave to serve this petition on only the named parties below, and (B) a ruling that the single copy of the class list lodged with the Clerk of the Court with the related petition for a writ of certiorari in No. 82-287 (filed August 16, 1982) satisfies all other filing requirements for this petition.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION OF THIS COURT	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	7
I. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE RULES OF THE SUPREME COURT AND ALL CIRCUIT COURTS OF APPEAL	7
II. THIS PETITION PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION WHOSE IMMEDIATE RESOLUTION BY THIS COURT IS NECESSARY FOR THE EFFICIENT ADMINISTRATION OF ALL FEDERAL COURTS	9
III. THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 455(b)(4) GOES BEYOND THE STATED INTENT OF CONGRESS AND WOULD DISRUPT THE ORDERLY LITIGATION OF CLASS ACTIONS	11
CONCLUSION	15
APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES	PAGE
In re Cement and Concrete Antitrust Litigation, 1979-1 CCH Trade Cases ¶ 62,502 (D. Ariz. 1979)	4
In re Cement and Concrete Antitrust Litigation, 437 F. Supp. 750 (J.P.M.D.L. 1977)	4
In re Cement and Concrete Antitrust Litigation, 465 F. Supp. 1299 (J.P.M.D.L. 1979)	4
In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1076 (D. Ariz. 1981)	ii, 2, 4, 5, 6, 7
In re Cement and Concrete Antitrust Litigation, 673 F.2d 1020 (9th Cir. 1982)	4
Mead Corp. v. *Adams Extract Co.*, ___ U.S. ___, 102 S.Ct. 1994 (1982), *denying cert. sub. nom. In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981)	8
Weyerhaeuser Co. v. *Lyman Lamb Co.*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.*, No. 81-1619, ___U.S.___, 102 S.Ct. 2232 (1982), *granting cert. sub. nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981)	ii, 8

MISCELLANEOUS	
15 U.S.C. § 1	3
15 U.S.C. §§ 15 and 26	4
28 U.S.C. § 1	10
28 U.S.C. § 455	*passim*
28 U.S.C. § 455(b)(4)	i, ii, 4, 5, 11
28 U.S.C. § 455(b)(5)(ii)	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1292(b)	2, 9
28 U.S.C. §§ 1331 and 1337	4
28 U.S.C. § 1407	4
28 U.S.C. § 1407(d)	7
28 U.S.C. §§ 2071 and 2072	8
28 U.S.C. § 2109	10
28 U.S.C. Appendix I § 301, *et. seq.*	12

MISCELLANEOUS	PAGE
Rule 23, Federal Rules of Civil Procedure	i, 4
1982 Annual Report of the Director of the Administrative Office of the United States Courts	10
Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House of Representatives Comm. on the Judiciary, 95th Cong., 1st Sess. (1977)	12
Hearings on S. 1064 Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. (1971)	12, 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered October 1, 1982.

OPINIONS BELOW

The Opinion filed May 26, 1981, by Chief District Judge C. A. Muecke is reported at 515 F. Supp. 1076 (D. Ariz. 1981), and is reprinted as Appendix B to the petition for a writ of certiorari in No. 82-287.[1] The October 1, 1982 opinion by the United States Court of Appeals for the Ninth Circuit affirming Judge Muecke's decision is not yet officially reported, and is reprinted as Appendix A hereto.

JURISDICTION OF THIS COURT

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is 28 U.S.C. § 455, reprinted as Appendix I to the petition in No. 82-287.

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[1] On August 16, 1982 petitioners herein filed a petition for a writ of certiorari from the January 27, 1981 opinion of the Court of Appeals for the Ninth Circuit, as modified April 15, 1982, rejecting jurisdiction to review Chief Judge Muecke's May 26, 1981 recusal decision under 28 U.S.C. §§ 1291 and 1292(b). That petition has been assigned this Court's Docket No. 82-287, and is related to the instant petition in that (A) both arise from the same matter, and (B) No. 28-287 presents as a threshhold question the substantive issue of recusal law presented here. On October 12, 1982 this Court granted petitioners' motion to defer consideration of No. 82-287 in order to consolidate review of that petition with evaluation of the instant petition. Accordingly, petitioners incorporate herein by reference the Appendices to petition No. 28-287.

STATEMENT OF THE CASE

Beginning in September 1976, petitioners[2] brought a total of 32 separate actions in 12 different district courts, individually and as class representatives, seeking monetary and injunctive relief from the real parties in interest and other defendants[3] for an alleged conspiracy to fix, stabilize and maintain the price of cement and cement-containing products throughout the United States in violation of section 1 of the Sherman Act, 15 U.S.C.

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[2] Petitioners and/or plaintiffs below are: the States of Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas and Utah; Rubenstein Development Company and Harry Rubenstein; Bill Carson d/b/a Bill Carson Construction and Bill Carson Construction Co., Inc.; Leavell Company; James I. Barnes Construction Co. and James I. Barnes Construction Co., Inc.; William P. Jungelaus; Buck Brown Contracting Company, Inc.; Hechinger Company; Katterjohn Concrete Products of Owensboro, Kentucky, Inc.; The Sta-Dri Company; York Concrete Co. and York Concrete, Inc.; Sea Foamed of San Diego and Sea Foamed of Arizona; Vincent S. Perry and Ellis F. Hendricks, individually and d/b/a Perry and Hendricks; Estes Homes; The Lusk Corp., Marved Construction, Inc.; Beauty Built Homes, Inc., Witt Construction Co., Inc.; Meadowlane Estates, Inc.; Wood Bros. Homes, Inc.; Sabino Vista Realty & Developments, Inc.; Melvin Zuckerman; Loma Verde Development Co.; Wood Bros. Lumber Co.; Blankenship Builders, Inc. and Blankenship Construction Co.; Wooldridge Construction Co.; John Talley and John Talley Construction, Inc.; Picou's Builders Supply, Inc.; City of Austin, Texas; Northern Materials, Inc.; Smith & Green Corp., Allen R. Smith and Raymond Green; Colorado Concrete Mfg. Co.; Walter K. Laursen d/b/a Thriftway Lumber and Thriftway Lumber Company; and Edward W. Bergquist, as Trustee in Bankruptcy for Western Concrete Products Corp.

[3] Real parties in interest and/or defendants below are: Alamo Cement Corp.; Alpha Portland Industries, Inc.; Arkansas Cement Corp.; Ash Grove Cement Co.; Capitol Aggregates, Inc.; Centex Corp.; Centex Cement Corp.; Citadel Cement Corp.; Columbia Cement Corp.; Coplay Cement Mfg. Co.; Cyprus Hawaiian Cement Corp.; Dundee Cement Co.; Filtrol Corp.; General Portland, Inc.; Giant Portland Cement Co.; Ideal Basic Industries, Inc.; Kaiser Cement Corp.; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; Louisville Cement Co.; Marquette Co.; Martin-Marietta Corp.; Medusa Corp.; Missouri Portland Cement Co.; Monarch Cement Co.; Monolith Portland Cement Co.; National Cement Co., Inc.; National Gypsum Co.; Nevada Cement Co.; OKC Corporation; Oregon Portland Cement Co.; Portland Cement Association; Portland Cement Co. of Utah; Santee Portland Cement Corp.; The Flintkote Co.; United States Steel Corp.; Valley Cement Industries, Inc.; Whitehall Cement Mfg. Co.; and Wyandotte Cement Inc. Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries, and affiliates of the various real parties in interest known to petitioners is set forth in Appendix J to the petition in No. 82-287 and Appendix I to respondents' brief in opposition in No. 82-287.

§ 1. The jurisdiction of the district court is based upon 28 U.S.C. §§ 1331 and 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 12, 1977, the Judicial Panel on Multidistrict Litigation transferred these actions to respondent United States District Court for the District of Arizona and assigned them to Chief Judge C. A. Muecke for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Cement and Concrete Antitrust Litigation*, 437 F. Supp. 750 (J.P.M.D.L. 1977). *See also In re Cement and Concrete Antitrust Litigation*, 465 F. Supp. 1299 (J.P.M.D.L. 1979).

Following extensive discovery and voluminous briefing, Chief Judge Muecke certified that these actions should proceed as class actions pursuant to Rule 23, Federal Rules of Civil Procedure. *In re Cement and Concrete Antitrust Litigation*, 1979-1 CCH Trade Cases ¶ 62,502 (D. Ariz. 1979). Further discovery was then undertaken and a master class list of 210,235 names and addresses compiled. *In re Cement and Concrete Antitrust Litigation*, 673 F.2d 1020, at 1022 (9th Cir. 1982). Using this list for mailed notice and also giving supplementary notice by publication, the putative class members were advised pursuant to Rule 23(c)(2), Federal Rules of Civil Procedure, of the pendency of this litigation and of their right to be excluded from the classes.[4] The deadline for putative class members to seek exclusion from the class expired on December 31, 1980 and, more than four years after the litigation was first commenced, the membership of the class was finally fixed.

On February 23, 1981, the real parties in interest filed a motion asking Chief Judge Muecke to recuse himself under 28 U.S.C. § 455(b)(4). CA9 App. Ex. 14. That motion was based on the fact that Chief Judge Muecke's wife had inherited as her sole and separate property stock in seven absent class members. 515 F. Supp. at 1080, 1082-83. The motion argued that Chief Judge Muecke was required to recuse himself no

[4] Exhibit 6 in "Appendix to Petition for Permission to Appeal From the United States District Court for the District of Arizona Pursuant to Title 28 U.S.C. § 1292(b) and Brief of Petitioner" (hereinafter "CA9 App. Ex. ").

matter how insignificant his wife's stock holdings because (1) absent class members are "parties" to the litigation within the meaning of 28 U.S.C. § 455(b)(4), and (2) his wife's stock ownership was "a financial interest in the subject matter in controversy" under section 455(b)(4).

Based solely on his conclusion that absent class members are parties,[5] Chief Judge Muecke granted the motion of the real parties in interest and recused himself on May 26, 1981. Chief Judge Muecke noted that any conceivable financial benefit to his wife was so insignificant that it could not "seriously be contended that [his] continuation in this matter creates the appearance of impropriety," (515 F. Supp. at 1081) and lamented over the wastefulness and inefficiency of transferring the litigation to a new judge.[6] Nonetheless, he interpreted section 455(b)(4) as imposing a mandatory requirement of recusal based upon his wife's stock ownership in absent class members:

> I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to

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[5] With regard to the alternative basis for recusal advanced by the real parties in interest, Chief Judge Muecke found "the term 'subject matter in controversy' to be inherently vague," but noted that his "conclusion that the 'parties' provision of § 455 is applicable to the present case makes the resolution of the 'subject matter in controversy' issue unnecessary." 515 F. Supp. at 1080. The Ninth Circuit noted that it was "fully briefed and argued . . . both before the district court and this court," and stated:

> we have no hesitation in concluding, for purposes of our mandamus analysis, that Judge Muecke was not required to recuse himself on the latter ground.

Appendix A at A-17, n.8.

[6] Chief Judge Muecke commented:

> Compare my wife's financial interest in this litigation with the burden of applying § 455. As I have said, this case is into its sixth year. This Court has entered 75 pretrial orders, decided countless motions, and retains a working knowledge of where the suit has been and where it is headed. Such knowledge is crucial to competent case management. To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.

515 F. Supp. at 1081 (footnote omitted).

> continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

515 F. Supp. at 1078.

On October 1, 1982 the Court of Appeals for the Ninth Circuit issued an opinion on a petition for a writ of mandamus from Chief Judge Muecke's ruling in which it "reluctantly agree[d]":

> Thus, after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70. A new judge must now be assigned to conduct further proceedings.

Appendix A at A-31 and A-27. The Ninth Circuit noted that Congress had not considered the application of the *per se* recusal rule to class actions in enacting section 455, and agreed with Chief Judge Muecke that "[w]hen applied to complex multidistrict class actions . . . the statute appears to break down." *Id.* at A-19. The Court also recognized that "general law does not treat members and parties in an identical fashion . . . [as] a concession to the nature of class action suits and the purposes of Rule 23: if every class member had to be treated as a party in all circumstances, the purposes of Rule 23 might in some instances be frustrated." *Id.* at A-19-20.

Nevertheless, relying on the fact that "class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment" (*Id.* at A-20), the Ninth Circuit concluded that "for purposes of section 455, stock ownership in a class member constitutes an interest in 'a party to the proceeding.'" *Id.* at A-21-22. The Circuit Court also found support for its holding in the fact that Congress' concern for the avoidance of the appearance of impropriety caused it to reject the provision of the ABA Code of Judicial Conduct which permits the waiver of disqualification if a judge's interest in a party is insubstantial.

The Ninth Circuit recognized that the "administrative burden of applying section 455 in class action proceedings is far greater than in normal civil cases," and opined that application

of section 455 "in class action cases would seem to warrant congressional consideration." *Id.* at A-29. It noted that a judge in a class action can neither control the separate financial affairs of his or her spouse, nor follow the House Judiciary Committee's suggestion to confine investments to companies "not likely to become litigants in his court." *Id.* at A-29-30 and n.18. In the *Cement Litigation* alone there are over 210,000 putative class members, virtually a lifetime's worth of "parties" in a single suit. Despite questioning whether "the actual benefits of applying the *per se* rule in [class actions] outweigh the resultant disruption to the orderly and efficient administration of the judicial system" (*Id.* at A-30), the Ninth Circuit interpreted section 455 to require recusal upon the ownership of stock in a class member.

The Judicial Panel on Multidistrict Litigation has refused to appoint a new district judge to replace Chief Judge Muecke until after this matter is resolved. (Appendix H to petition No. 82-287). If the Judicial Panel follows the reasoning of the Ninth Circuit, it may be incapable of assigning a new judge.[7] Thus, some 17 months have now passed since Chief Judge Muecke recused himself, and serious questions exist over whether the Judicial Panel can appoint a new judge.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE RULES OF THE SUPREME COURT AND ALL CIRCUIT COURTS OF APPEAL

None of the administrative rules of this Court or any circuit court of appeals requires the submission of a list of class

[7] Under 28 U.S.C. § 1407(d), the concurrence of four Panel members is necessary "to any action by the Panel." The 1982 financial disclosure statements of Judges Caffrey, Daugherty, Harper and Pointer show stock holdings in entities on the Master Class List. Therefore, only three Panel members would not own stock "in a party to the proceeding" under the Ninth Circuit's ruling.

members to the clerk of the court for disqualification purposes.[8] Indeed, the normal practice in class actions under Supreme Court Rules 21 and 28.1 is simply to list the actual named parties to the proceeding and all parent, subsidiary and affiliate corporations. *Mead Corp.* v. *Adams Extract Co.*, ____ U.S.____, 102 S.Ct. 1994 (1982), *denying cert. sub nom. In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), and *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, No. 81-1618, and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.*, No. 81-1619, ____U.S.____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). These are cases, like the present one, involving nationwide classes including large, publically owned corporations. Yet in neither of those cases did this Court have before it a list of all class members.[9] Since the administrative rules of this and other federal courts must reflect substantive law (28 U.S.C. §§ 2071 and 2072), the Ninth Circuit's decision stands in conflict with the decisions of this Court and all other circuit courts regarding the need to explore possible interests in class members when evaluating potential disqualification.

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[8] *See* District of Columbia Circuit Rule 8(c); First Circuit Rule 8(a)(1); Fourth Circuit Rule 17; Fifth Circuit Rule 13.6.1; Seventh Circuit Rule 5(b); Eighth Circuit Rule 1(b); Ninth Circuit Rule 13(b)(3) (formerly Rule 13(e)); Tenth Circuit Rule 8(c)(8); and Eleventh Circuit Rule 22(f)(2). The Second, Third and Sixth Circuits do not have any rules requiring submissions identifying all interested persons.

[9] No review for possible disqualification as a result of ownership of stock in absent class members was done before certiorari was granted in *Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619 last term. See *e.g.*, *Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619, ____ U.S. ____ 102 S.Ct 2232 (1982), *granting cert. sub nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). However, based on the 1982 financial statement of Chief Justice Burger, it is apparent that he is a stockholder in the Edward Hines Lumber Company which may be a *Plywood* class member. Justices White and O'Connor have already recused themselves and further evaluations based on an examination of the class list may reveal that there is no quorum to review Nos. 81-1618 and 81-1619 unless the Ninth Circuit's interpretation of recusal law is rejected.

II.

THIS PETITION PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION WHOSE IMMEDIATE RESOLUTION BY THIS COURT IS NECESSARY FOR THE EFFICIENT ADMINISTRATION OF ALL FEDERAL COURTS

Both Chief Judge Muecke and the Ninth Circuit recognized the importance of resolving the question whether stock ownership in a class member mandates the *per se* recusal of a federal judge under section 455. In certifying his opinion for interlocutory review pursuant to 28 U.S.C. § 1292(b), Chief Judge Muecke found that his recusal "involve[d] a controlling question of law as to which there is a substantial ground for difference of opinion. . . ." Appendix C to the petition in No. 82-287. Similarly, the Ninth Circuit, while discussing its election to review Chief Judge Muecke's recusal under its general supervisory authority, repeatedly commented on the gravity of the issue presented here:

> We are concerned with far more than the injury to these particular petitioners; we are concerned, *inter alia,* with the effect of the challenged order on the operation of the courts.

Appendix A at A-9.

> [W]e are faced with the need to resolve a significant question of first impression where the failure to do so may adversely affect the efficient operation of the district courts.

Id. at A-10.

> We believe that the petition in this case presents a new and far reaching question of major importance to the district courts, that the question is likely to continue to evade review and that its resolution would add importantly to the efficient and orderly administration of the district courts. The exercise of our supervisory mandamus authority is appropriate under such circumstances.

Id. at A-12.

> [T]he petition presents a question of law of first impression, the resolution of which would have a substantial effect on the orderly and efficient administration of the courts. . . .

Id. at A-16.

As of June 30, 1982 there were 3,263 class actions pending in United States District Courts.[10] The Ninth Circuit has enunciated a rule of law which, by its own admission, may make judicial disqualifications in such cases "the rule rather than the exception." Appendix A at n. 18. Currently there are no procedures established in any circuit (including the Ninth Circuit) for the practical implementation of *per se* recusals based upon stock ownership in class members.

As a result of the ethical responsibility of members of the judiciary to examine potential conflicts *sua sponte*, the issue presented by this petition will arise repeatedly in all pending and future class actions. For example, this issue is raised as a threshold question in the petition in No. 82-287, even though that petition concerns jurisdictional rulings by the Ninth Circuit.[11] The same issue is present, albeit "behind the scenes", in the *Plywood* litigation, Nos. 81-1618, and 81-1619, and will arise in all other class actions which come before this Court. The general importance of the issue presented here to the federal judiciary makes it appropriate that the question of recusal for stock ownership in an absent class member be resolved by this Court to insure the consistent application of section 455 in all federal class actions.

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[10] See, 1982 Annual Report of the Director of the Administrative Office of the United States Courts, Table 33.

[11] If a single share of stock in an absent class member is a disqualifying interest, this Court would not be able to grant or deny the petition in No. 28-287 or decide the preliminary procedural motion for relief from the Rules filed concurrently therewith. Under 28 U.S.C. § 2109, this Court must affirm lower court judgments when a quorum of six Justices (28 U.S.C.§ 1) cannot be convened. Applying the Ninth Circuit's ruling to this Court in the *Cement* litigation results in the recusal of five Justices, thereby precluding a quorum and preventing consideration of the petition. The Justices' 1982 financial disclosure statements shows that Chief Justice Burger owns stock in Minnesota Mining & Manufacturing, Corp., Honeywell, Inc. and Edward Hines Lumber

(Footnote continued on next page)

III.

THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 455(b)(4) GOES BEYOND THE STATED INTENT OF CONGRESS AND WOULD DISRUPT THE ORDERLY LITIGATION OF CLASS ACTIONS

Both Chief Judge Muecke and the Ninth Circuit noted that the legislative history of 28 U.S.C. § 455(b)(4) contains no expression of congressional intent as to whether stock ownership in absent class members should be treated like stock ownership in parties. Thus, the Ninth Circuit's ruling that class members and parties should be treated identically for recusal purposes is, in reality, a supposition of what Congress might have done if it had thought about the issue. Surprisingly, the Ninth Circuit concluded that Congress would have done something which is both impractical and disruptive of class litigation, and contrary to several of the stated purposes for establishing a *per se* recusal rule.

The Ninth Circuit observed that the *per se* recusal rule was applied to interests in parties to eliminate the need for deciding whether an interest was substantial. However, two equally important congressional considerations were the avoidance of uncertainty in recusal matters and the disqualification of judges at the outset to minimize disruption to litigation. The legislative history of section 455 unequivocally demonstrates that Congress drafted the *per se* recusal rule to apply to stockholdings in entities of record which can be easily identified. As stated during the Senate Judiciary subcommittee hearings on section

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(Footnote continued from previous page)

Co.; Justice Blackmun owns stock in Minnesota Mining & Manufacturing, Corp., IBM, J.C. Penny, and Coca Cola; Justice Powell in Ethyl Corp., Proctor & Gamble, and Caterpillar Tractor; Justice Rehnquist in Southern California Edison; and Justice O'Connor in Eastman Kodak and Nalco Chemical Corp., all of which appear on the Master Class List. Justice O'Connor also appears to be disqualified under 28 U.S.C. § 455(b)(5)(ii) because of her spouse's former membership in a law firm representing a number of respondents and defendants herein. As is true with the petition in No. 82-287, the underlying issue of this petition (i.e., is a class member a "party" under section 455) must be decided as a prerequisite to the decision to accept jurisdiction to review the Ninth Circuit's opinion.

455, the intent was not to "put judges in the position of where they cannot have stock at all," since, "as a practical matter," a judge would simply "have his portfolio . . . check[ed] . . . against the record" and disqualify himself if any company in which he owned stock appeared.[12] The following description of how such disqualifying interests were to be ascertained appears in the legislative history of the Financial Disclosure Act, 28 U.S.C. Appendix I § 301, *et. seq.*:

> [A] procedure may be established by which *an attorney . . . may submit* to the clerk of the court, *at the time of filing the case* or thereafter, *a list of parties* and interests which he believes may be substantially affected by the outcome of the litigation. The clerk will then . . . indentify those parties and interests, if any, in which the judge has a financial interest as reflected in his filed disclosure statements.[13] (Emphasis added.)

While such procedures have been established, none of them are designed to accommodate a situation where it is impossible to know the identity of the "parties" to a proceeding until after the district court has: (1) ruled on the propriety of class certification, (2) settled upon a final class definition and form of notice, (3) ordered notice disseminated, (4) set a deadline for requesting exclusion from the class, and (5) determined whether those persons and entities not requesting exclusion actually qualify for class membership. Frequently this final step is not completed until claims are processed at the conclusion of the litigation.

As a practical matter, the nature of class action suits often results in the identity of individual class members *never* actually coming to the judge's attention. All of the administrative

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[12] Hearings on S. 1064 Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., at 36. (1971) (hereinafter cited as "Senate Subcommittee at ").

[13] Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House of Representatives Comm. on the Judiciary, 95th Cong., 1st Sess., at 488-489 (1977).

aspects of compiling the class list and processing claims are handled by the lawyers. Accordingly, as was the case with Chief Judge Muecke, counsel and not the Court may control the information which triggers disqualification for an interest in a class member.

The question of when ownership of stock in putative class members ripens into a disqualifying interest is further complicated by the fact that a judge's holdings may change during the course of litigation.[14] If recusal turns upon class membership being finally fixed, it will almost certainly occur well into the litigation. A judge with an active portfolio could own stock in certain class members, sell that stock and buy stock in other class members many times before that occurred. Presumably this would mean that he or she would have a disqualifying interest at certain times and not at others, probably without even being aware of the situation.

This, of course, raises the additional question of the finality of the judge's pre-recusal decisions. Chief Judge Muecke had entered seventy-five pretrial orders, including certification of the *Cement* classes, before the opt-out period closed and defendants informed him that at least one of the entities in which Mrs. Muecke owned stock made purchases which qualified it for class membership. It certainly can be anticipated that any new judge may be confronted with motions to vacate all or some of those orders on the grounds that the issues were decided by a judge with a disqualifying interest in a party.

Despite the Ninth Circuit's view that "Congress' main concern in adopting section 455 was to promote public confidence in the impartiality of the judiciary" (Appendix A at A-29), it does not follow that had Congress considered whether class members should be treated as parties for recusal purposes

[14] The real parties in interest argued in their opposition to the petition in No. 28-287 that the mere fact that certain Justices' financial statements ("current only as of December 31, 1981") show stock ownership in *Cement* class members does not necessarily mean that "any Justice . . . [will] ha[ve] such a shareholding . . . at the time the recusal issue is properly presented. . . ." Opposition at n.18. Ascertaining when the recusal issue is properly presented may well be more difficult in district courts than in this Court.

it would have totally sacrificed the benefits of promoting the efficient administration of the courts by applying per se disqualification to interests which are neither apparent from the pleadings nor easily identifiable. Congress enacted a per se recusal rule which is "practical enough to be livable."[15] It is simply not logical to presume that it would have intentionally extended that recusal rule in a manner to bring down upon the judiciary the chaos which both Chief Judge Muecke and the Ninth Circuit found results from the automatic recusal of judges who own a single share of stock in an absent class member.

In reality, to apply section 455 to stockholdings in class members defeats Congress' intention that disqualification be controlled by the judiciary and occur at the outset of litigation. Yet, to achieve those goals under the Ninth Circuit's ruling, an even more restrictive rule must emerge—*per se* disqualification for stock ownership in *potential* class members. In order to return control over the early determination of recusal to the courts, the first activity in a newly filed class action will have to be the assembling of a list of all potential class members who can be identified with reasonable effort. That list would then be compared to the judge's financial disclosure statement. The possibility that any such entities might opt-out if the class is certified, or that the class might not be certified, would have to be ignored. In large class actions this effort will require a sizable expenditure of time and money regardless of whether the action is ultimately certified to proceed as a class action. Furthermore, unnecessary recusals will occur where the class is not allowed or where the disqualifying entity opts-out or cannot prove class membership. In multidistrict litigation such a list would have to be submitted to the Judicial Panel for use in (A) ascertaining its ability to act, and (B) selecting a transferee forum. If the experience of this case is any indication, it is probable that there will be litigation which the Judicial panel may be unable to assign.

When Congress said "party to the proceeding" it meant the persons identified in the claims and counterclaims, who had hired lawyers and were actively engaged in litigation. Those

[15] Senate Subcommittee at 37.

persons are identifiable from the pleadings, which provide a workable method for determining disqualifying interests. Petitioners do not suggest that an interest in a class member may never require recusal or that such interests are not covered by section 455. Congress wrote a provision applicable to interests other than those in parties or the subject matter in controversy, and it is under that provision for "other interest[s]" that stock ownership in absent class members properly falls.

CONCLUSION

The petition for a writ of certiorari should be granted.

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